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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER GORDON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0605-CR-203
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Natalie Bokota, Magistrate
The Honorable Thomas P. Stefaniak, Jr. Judge
Cause No. 45G04-0507-FA-34

January 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Christopher L. Gordon appeals his conviction, following a jury trial, of dealing in cocaine, a Class A felony.[1] On appeal, Gordon raises the single issue of whether a police officer's testimony stating his opinion that the amount of drugs found on Gordon demonstrated that he was a dealer, and not merely a user, was inadmissible under Indiana Evidence Rule 704(b). We conclude that the testimony was inadmissible, but that any error in its admission was harmless. Therefore, we affirm.

Facts and Procedural History

On July 5, 2005, Gary police officers responded to a report of a gunshot victim. When they arrived on the scene, officers found the gunshot victim lying in the street, and Gordon kneeling on the ground beside him. An officer searched Gordon and discovered a handgun, for which Gordon stated he did not have a license. After placing Gordon under arrest, officers searched Gordon again and discovered seventeen bags of a rock-like substance, which was later determined to be approximately 5.9 grams of crack cocaine. Officers later discovered another handgun on Gordon's person.

The State charged Gordon with dealing cocaine and possession of a handgun without a license. At trial, Gordon was represented by James Krajewski. The State called several officers involved in the case, including Officer Kirk Banker, who testified as follows:

> State: And how many cases have you been involved with where you investigated drugs and drug dealings?
> Banker: In the three years, hundreds.

[1] Gordon was also convicted of carrying a handgun without a license, a Class A misdemeanor. Gordon does not challenge this conviction on appeal.

State: Hundreds. Calling your attention back to State's Exhibit No. 2-A, noting how the drugs are packaged, how would you say they are packaged?

Banker: There are several individually packaged. It would be more in the quantity would be dealing. You know, this is more than just simple -- --

Krajewski: Objection, Judge.

Banker: -- -- merely user quantity.

Court: Excuse me. Your objection, Mr. Krajewski?

Krajewski: He doesn't have the qualifications to say that.

Court: State, your response to the objection.

State: The state believes that it has laid out sufficient foundation to qualify Detective Banker as a skilled witness in the area of drug trafficking. He stated his training. He stated his involvement in hundreds of cases. He's been in the drug unit for three years, so state believes he is qualified to comment on how these drugs are packaged and for what purpose.

Court: All right. The objection is noted but it is overruled. Go ahead. You can answer.

Banker: The quantity a user may have a couple, you know, one, two, three, four maybe at the most. A user wouldn't have, you know, seventeen, eighteen bags of an off white rock-like substance, as well as, you know, users don't carry handguns with them.

Transcript at 117-19.

The jury found Gordon guilty of dealing cocaine and of possession of a handgun without a license. At sentencing, the trial court sentenced Gordon to twenty years for dealing cocaine, and one year for possession of a handgun, and ordered that the sentences run concurrently. Gordon now appeals his conviction for dealing cocaine.

Discussion and Decision[2]

Gordon argues that Officer Banker's testimony was inadmissible opinion testimony under Indiana Evidence Rule 704(b). The rule states:

> (a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.
> (b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

We have interpreted this rule to mean:

> [A] police officer or law enforcement official who is offered and qualified as an expert in the area of drugs, drug trade, drug trafficking, etc., may offer testimony as to whether particular facts tend to be more or less consistent with dealing in drugs. However, the expert may not make conclusions as to whether the defendant is a dealer or whether the defendant had the intent to deal or deliver. . . . In essence, the expert may comment on the facts of the case, but must refrain from making any conclusions as to the defendant's intent, guilt, or innocence.

Scisney v. State, 690 N.E.2d 342, 346 (Ind. Ct. App. 1997), aff'd in relevant part, 701 N.E.2d 847 (Ind. 1998). In Scisney, the prosecutor described the facts surrounding the defendant's arrest to an officer, who then testified, "[b]ased on the elements that you advised me of that would lead me to believe that person to be a suspect dealer." Id. We concluded that this

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[2] We note the State argues that Gordon has waived this issue by failing raise a proper objection at trial. We express no opinion on whether Gordon failed to preserve the issue, and choose to address his argument on the merits. Cf. Foley v. Manor, 844 N.E.2d 494, 496 n.1 (Ind. Ct. App. 2006) (noting our "preference to resolve cases that come before us on their merits where possible"); Collins v. State, 639 N.E.2d 653, 655 n.3 (Ind. Ct. App. 1994), trans. denied (although party cited no authority in support of his argument, court addressed issue based on "strong preference to decide issues on their merits"). Because we do not address the issue of whether Gordon's objection at trial properly notified the court of the testimony's potential inadmissibility under Rule 704(b), we do not frame the issue on appeal as whether the trial court abused its discretion in admitting the evidence. Instead, we examine only whether the evidence was in fact inadmissible pursuant to this rule.

testimony constituted an opinion on the defendant's intent to deliver, and was therefore inadmissible. Id. We recognized that an officer may comment that certain facts tend to be consistent with dealing, but found disturbing the officer's conclusion that the facts of the case would lead him to believe the defendant to be a "suspect dealer." Id. at 346 n.2. Although the officer did not directly state a conclusion that the defendant had the intent to deliver, we recognized "there is no doubt the jury could have assumed that he was referring to Scisney when he concluded 'that person to be a suspect dealer.'" Id. at 346.

In this case, we similarly conclude Officer Banker's statement, "this was more than just simple . . . merely user quantity," exceeded mere commentary on the facts of the case, and instead constitutes an opinion of Gordon's intent to distribute. Such an opinion is inadmissible. We find this a close case and recognize that Officer Banker did not directly state, "Gordon, in my opinion, is a drug dealer." However, in the context of the State's questioning, the jury was undoubtedly left with the impression that Officer Banker was offering his opinion that Gordon was a drug dealer. Officer Banker would have been permitted to testify that generally certain quantities or methods of packaging are characteristic of drug dealing. However, by stating that the specific drugs found on Gordon were "more in the quantity would be dealing," and that "this is more than just a simple . . . merely user quantity," tr. at 118 (emphasis added), Officer Banker offered his opinion that Banker himself was a drug dealer in violation of rule 704(b).

Although this testimony was inadmissible, any error that may have existed in the admission of Officer Banker's testimony is harmless unless the admission "appears

inconsistent with substantial justice or affects the substantial rights of the parties." McManus v. State, 814 N.E.2d 253, 259 (Ind. 2004), cert. denied, 126 S.Ct. 53 (2005). In other words, "[a]n evidentiary error is harmless if the reviewing court determines that 'the probable impact [of the improperly admitted evidence] on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.'" Lambert v. State, 675 N.E.2d 1060, 1065 (Ind. 1996), cert. denied, 520 U.S. 1255 (1997) (quoting Fleener v. State, 656 N.E.2d 1140, 1142 (Ind. 1995)). In Scisney, we found the error in admission to be harmless based on the fact that the defendant had been found with more than twenty-three grams of cocaine. 690 N.E.2d at 347. We based this conclusion on the fact that "'[e]vidence of the illegal possession of a relatively large quantity of drugs is sufficient to sustain a conviction for possession with intent to deliver.'" Id. (quoting Beverly v. State, 543 N.E.2d 1111, 1115 (Ind. 1989)). Here, although the 5.9 grams of crack cocaine found on Gordon was not nearly as great an amount as that in Scisney, the crack cocaine found on Gordon was divided into seventeen baggies. Cf. Berry v. State, 574 N.E.2d 960, 964 (Ind. Ct. App. 1991), trans. denied (evidence that defendant possessed large amount of controlled substance, as well as small plastic bags and twist ties, was sufficient to support inference of intent to deliver). We find this evidence alone sufficient to support a finding that Gordon possessed cocaine with the intent to deliver.

Although we affirm, we reiterate our admonishment in Scisney: "we stress that it is improper to solicit testimony from a witness as to whether the evidence suggests the defendant is more likely a dealer than user. It is improper to do so in any form whatsoever."

690 N.E.2d at 347. However, on the facts of this case, we cannot say the admission of the testimony affected Gordon's substantial rights, and therefore, any error in its admission was harmless.

Conclusion

We conclude Officer Banker's testimony was inadmissible pursuant to Indiana Evidence Rule 704(b). However, we also conclude that the admission did not affect Gordon's substantial rights and that any error in its admission was harmless.

Affirmed.

BAKER, J., and DARDEN, J., concur.